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A COMPARATIVE OVERVIEW OF AMERICAN PRODUCTS LIABILITY*

by Peter W. Schroth**

To an American lawyer taking a first look at Yugoslavian products liability, what is most striking is the similarity of your rules and ours. Upon deeper reflection, the similarity appears more superficial, and the underlying differences in the two systems appear more important. Nevertheless, since understanding each other's systems is only part of the purpose of closer relationships between the lawyers and legal scholars of our two countries, I think it is important to pay special attention to what we share. Accordingly, I will devote parts I and II of this article to the similarity of the rules and the fundamental differences between the systems in which these rules are used. In part III, I will discuss some recent developments and trends in American products liability, and in the conclusion I will discuss the tendency of our systems to find similar solutions to what are, at base, similar problems.

* This was the keynote address of part 2 of the Second Bilateral Scientific Conference of United States and Yugoslav Jurists, held in Belgrade, August 16-21, 1978. All of the papers from the Conference appeared in Serbian or Macedonian in *Pravni Život*, the leading Serbian-language law review.

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1. *The Similarity of the Rules*

Yugoslavian private law appears to a common lawyer to be very much in the general European tradition.¹ The inheritance from Roman law is still apparent in many areas, especially from the part of what is called "Roman" law that was developed by the Italian glossators and commentators and their successors, and later by the German legal scholars.

Our habit in the United States is to study the French and West German civil law, and to assume that these give us a good basis for understanding the systems of other Western civil-law jurisdictions. We often go on to study the Soviet system and Russian civil law as the prototype for Eastern Europe. Americans thus are quite surprised to find the private-law system in Yugoslavia much more closely resembling that of France than that of Russia. But once we absorb the fact that the Socialist Federal Republic of Yugoslavia is not quite as far from Western Europe as its Communist name and its difficult languages might lead us to expect, the fact that the code which has acted as a bridge between you and us is Austrian, rather than French or German, is a relatively minor matter.² (For the American lawyers in the audience, however, let me note that Yugoslavian products liability bears little resemblance to that of Austria, which is much less advanced.) And when your new Law of Obligations takes effect later this year, we should find mutual understanding even easier, since instead of searching from the ABGB through the writers and the decisions we will be able to begin our study with a modern statement of the law. I hope that we will soon have an English translation of this new code to assist our studies.

We really should not be surprised that Yugoslavian law is so much in the Roman tradition, since most of the world's legal systems are more or less in the Roman tradition. What is much more

1. For general descriptions of Yugoslavian private law in English, see A. G. CHLOROS, *YUGOSLAV CIVIL LAW: HISTORY, FAMILY, PROPERTY* (1970); Blagojević, *Yugoslavia*, 1 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* Y-5 (1975); INSTITUTE OF COMPARATIVE LAW, *GUIDE TO THE YUGOSLAV LEGAL SYSTEM* (1977).

2. A good English translation of the ABGB (*Allgemeines bürgerliches Gesetzbuch*) by Paul L. Baeck was published in 1972 by the Parker School of Columbia University, and is available from Oceana Publications, Inc. It is based on the amended text in effect in Austria, however, rather than on the different versions used in parts of Yugoslavia.

significant, and what we would surely find astonishing if it were not so familiar, is the extent to which English and American law managed to escape the Roman influence almost completely.

England, after all, had been a Roman colony for 400 years, ending in the early part of the fifth century, and the Roman influence of the Christian Church was never driven out of Wales. Christianity and the potential for Roman private law returned to England with St. Augustine about 600, where the Roman Catholic influence grew stronger in almost every period until the Reformation of the sixteenth century. The Norman conquest in 1066 was by an army carrying the Pope's banner; and canon law, which was largely based on Roman law, was enforced by the church courts in England for several centuries thereafter. Oxford University taught Roman law and canon law almost from its beginning in the twelfth century, and the great Bracton's thirteenth-century treatise was thoroughly in and of the Roman-law tradition of Azo and Bologna University.

But the point I wish to emphasize is that the judges and sergeants who developed the common law in the period between Bracton and the Reformation did so in nearly total isolation from Roman law.³ Their system was almost purely procedural on its surface, the overt question being whether the King's writ would issue. If it did, the trial was held somewhere else, without their participation. The substantive rules which became the common law of England were implicit in the procedures that determined whether the writ would issue, but because they were only implicit it was possible to think that only procedural questions were involved. And procedural questions, then as now, were matters of the *lex fori* and not points on which Roman law seemed relevant.

These pleaders and judges were not, in general, scholars of Roman and canon law, and when they were they usually did not mix this learning with their work in the English courts. It is true that the parallel system of equity, which rose to power in the sixteenth century, brought some of the ideas of the canon law back as a counterbalance to the common law. And it is true that common law and equity have largely merged into a unified system in modern England and America. But after Bracton in the 1250's there was not another scholarly treatise on the whole law of England until Blackstone in the 1760's, and by that time the common law had so long been isolated from general scholarship that it had permanently

3. The best treatment of this subject is J. DAWSON, *THE ORACLES OF THE LAW* 1-99 (1968).

established its independence from the legal traditions of the rest of the Western World.

The common law came to America in the form of Blackstone's treatise, which could be carried in a lawyer's saddlebags, rather than of the more cumbersome English Year Books and case reports. It is probably fair to say that Blackstone saved the common law in America, for had it not been given to us in such a convenient form, we probably would have succumbed to the temptation to join the other great revolutionary people of the late eighteenth century, the French, in adopting a civil code. As it was, we came very close,⁴ but like Savigny's Germany we postponed codification, and like Germany when we finally began to codify our law we produced something uniquely our own.

What we produced in America was a series of commercial statutes around 1900 which, taken together, amounted to a commercial code, and then a very different comprehensive statute around 1950 which is called a Uniform Commercial Code. Neither is very close to Blackstone and English law, since most of the commercial practices for which they were designed developed during the nineteenth and twentieth centuries.⁵ They were based primarily on American case law, and much of the Uniform Commercial Code may be read as a pointed lecture by the great comparatist⁶ Karl Llewellyn,⁷ its drafter, telling the judges not to be slaves to rules or codes, but rather to consider the evolving patterns of business and society and to explain their reasons in the common law tradition.⁸ Your courts seem to have felt free to depart from the rules of the Austrian and Serbian civil codes to the extent that these rules were outdated, and I hope that they will feel the same sort of freedom in dealing with the Law of Obligations a few years from now, when it also becomes outdated. Whether in Austria, or in France, or in Yugoslavia, or in America, it is only the process of continual re-

4. See B. SCHWARTZ, *THE LAW IN AMERICA: A HISTORY* 67-75, 133-37 (1974).

5. See Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461 (1967).

6. See M. RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 72-76 (1974).

7. Cf. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

8. See Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

interpretation that keeps a code alive and valuable.

What we did not produce, and perhaps never shall produce, is a civil code. On the contrary, we have the *Restatements of the Law*, the work of committees of law professors, judges and attorneys, and while these documents look refreshingly like codes to foreign lawyers who are lost in the wilderness of our case law, they are not designed for enactment anywhere. They are also not a description of the existing law of anywhere, and to some extent the tendency in recent versions has been to propose reform rather than to restate the law.

A final point here is that American law is now even more isolated from the community of legal thinking in the rest of the world than England's was in centuries past. Our ignorance of foreign languages has become legendary: where they used to be required for admission to the universities, they are no longer required even for graduation, and at many schools the pre-law students are advised against studying languages. The decline in the practical use of comparative law in developing American law which began with the First World War against Germany was slowed by the great European scholars who came to us as refugees from the Nazis in the 1930's and 1940's. But the decline has never entirely stopped, and as these men reach the end of their careers it threatens to accelerate again. Comparative law is taught at all to only a small fraction of American law students, and it is taught seriously and well to extremely few. While excellent comparative scholarship is still found in the United States, the benefits almost all flow outward, to the world which studies us far more carefully than we study it.

I have taken so long in making this point that you may have forgotten what it was, so let me summarize: your private law is directly descended from the new Roman law of the Middle Ages, admittedly with some important changes to meet modern conditions, while ours is separated from that root by at least three formidable barriers. First the early English common-law courts cut themselves off from Roman and canonist learning; then American courts, which got their English law through Blackstone's filter anyway, turned their attention to American problems⁹ and to the decisions of American courts; and now the American legal profession generally is closing its eyes to the world. And yet for all of that, your rules on products liability are so much like ours that with only cosmetic

9. See also M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977).

changes they could pass for those of an American state.¹⁰

In both countries, products liability may be based on contract, negligence or strict tort, and it is possible, as it is in West Germany but is not in France, to claim more than one in the same action. Our version of contractual warranties is now found in sections 2-313 through 2-318 of the Uniform Commercial Code. We define an express warranty as a promise, description or sample which becomes part of the "basis of the bargain." There are also implied warranties, which are imposed by law unless excluded or modified by the parties to the contract. The most important of these are merchantability and fitness for a particular purpose.

Merchantability is an open concept, whose attributes may be increased by case law, but includes at least fitness for the ordinary uses of goods of that type, and reasonable safety. There is an implied warranty of fitness for a particular purpose when the seller has reason to know of the buyer's purpose and that he is relying on the seller to select or to furnish suitable goods.

If a statute providing for full damages for breach of warranties to the consumer had existed in Yugoslavia, perhaps your courts would not have been willing to hold that tort law applied to the same cases. In the same way, American courts have been urged to apply only the rules of the Uniform Commercial Code in products cases, to the exclusion of tort theories.¹¹ A few months ago I would have told you that American courts were generally unconcerned with the overlap between tort and contract theories: that each was considered independently, and if both happened to apply to the same facts,

10. For what follows, I rely primarily on three articles by Yugoslav scholars: Matić, *Survey of Yugoslav Law Relating to Products Liability*, 2 *HAGUE-ZAGREB ESSAYS* 35 (1978); Pak, *Development of Yugoslav Law Relating to Products Liability*, 2 *HAGUE-ZAGREB ESSAYS* 41 (1978); and especially the Yugoslav national report of Professor Jakov Radišić for the Tenth International Congress of Comparative Law, which will take place next week in Budapest, *YUGOSLAV REPORTS FOR THE TENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 41 (1978). My own national report for that Congress, which contains a great deal of documentation not repeated here, has been published in *LAW IN THE U.S.A. IN THE BICENTENNIAL ERA*, 26 *AM. J. COMP. L. supplement* 67 (1978).

11. For a good discussion of both sides, with further citations, see Wade, *Is Section 402A of the Second Restatement of Torts Pre-empted by the UCC and Therefore Unconstitutional?*, 42 *TENN. L. REV.* 123 (1974). Professor Wade concludes that § 402A and the Uniform Commercial Code can coexist, and I agree.

the plaintiff could plead both, provided only that he could not recover twice.

Some doubt is cast on this by the latest decision of the highest court of New York, *Martin v. Julius Dierck Equipment Co.*¹² In earlier decisions, the Supreme Courts of New Jersey and California, which are the most advanced in products liability, had disagreed on the extent to which tort theories could be used when the parties had a contractual relationship. The New Jersey court's position was that the newly developed theory of strict liability in tort could be applied even to purely economic losses. In that case the plaintiff had purchased carpeting with defects that made it less valuable, but not dangerous.¹³ If tort law can be used even in this area, the statutory limitations on recovery in contract have little meaning. The California court, in a case where the plaintiff had purchased a truck that did not perform adequately for its business, expressly rejected the New Jersey view, holding instead that strict liability in tort was the appropriate theory only when physical injuries were involved.¹⁴

Notice that both the New Jersey and the California approaches leave a great many cases in which tort and contract theories are both permissible. In the *Martin* decision, on the other hand, the New York Court of Appeals seems to be saying that each has its proper sphere. Although there is a technical basis on which it could be argued that the decision relates only to its peculiar facts,¹⁵ the sweeping language used by the court suggests that we would be wiser to expect that it will take the same approach in future cases. If so, the New York rule will be that a plaintiff not in privity of contract with the defendant may sue only in tort and not in contract. Assuming that the New York courts continue to hold that purely economic losses may be recovered only in contract and not in tort,¹⁶ plaintiffs

12. 43 N.Y.2d 583, 403 N.Y.S.2d 185, 374 N.E.2d 97 (1978).

13. *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

14. *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (Traynor, J.). In a separate opinion Justice Peters argued for still another rule: that strict liability be available so long as the plaintiff is an "ordinary consumer" rather than a party able to bargain on equal terms with the seller.

15. Formally, *Martin* is only an interpretation of a New York statute on conflict of laws, CPLR § 202.

16. See *Trans World Airlines v. Curtiss-Wright Corp.*, 1 Misc.2d 477, 148 N.Y.S.2d 284 (1955). This is the rule in most states, and is in accord with § 402A of the **RESTATEMENT (SECOND) OF TORTS**, which provides for liability only

will be able to plead both theories simultaneously only if they are in privity of contract with the defendant and physical harm is involved.

In most states, however, the rule is still, as it is in Yugoslavia, that contract and tort theories may be pleaded together, at least if there is physical harm. Outside New York, privity of contract is not required either in warranty or in tort. A decision by Judge Cardozo of New York in 1916 allowing product negligence suits without privity¹⁷ was quickly followed by most states, and eventually by all. Meanwhile, the courts began to abolish the privity requirement for implied warranties of the fitness of food,¹⁸ then for express representations in the manufacturer's advertising literature,¹⁹ and finally for an implied warranty of general safety for all products.²⁰ This last rule was adopted by the courts and legislatures of many states in the early 1960's, and its various forms were inserted into the Uniform Commercial Code as alternatives: each state legislature was to decide which of three versions of warranty liability it preferred.²¹

in cases of "physical harm."

17. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

18. *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

19. *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, *aff'd on rehearing*, 15 P.2d 1118 (1932).

20. *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

21. The official Alternative revisions of § 2-318 are as follows:

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to

In practice, many states adopted one of the three, but several either made up versions of their own or omitted the section entirely.

Almost simultaneously, however, the courts began to base product liability on strict tort theories, that is, with no requirement of negligence. California's Justice Traynor had argued for this approach since 1944,²² and in 1963 he finally convinced the rest of the California Supreme Court.²³ Justice Traynor was also a member of the advisory committee for the *Restatement (Second) of Torts*, and section 402A, which appeared at about the same time, embodied the strict tort theory.²⁴

Since about 1963, then, strict warranty liability without privity has been competing with strict tort liability without privity. In general, the strict tort theory, which allows fewer defenses, has been emphasized by plaintiffs and adopted more widely. At least 44 of the 50 states recognize strict products liability in tort, although most of them also recognize warranty products liability in some form. But the *Restatement* has been no more successful in unifying the law than has the Uniform Commercial Code. For example, several states, including California and New Jersey, have refused to accept the *Restatement's* requirement that a defective product be "unreasonably

whom the warranty extends.

22. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

23. *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

24. The official version of § 402A is as follows:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

dangerous" to permit recovery,²⁵ although over 20 other states have so far accepted it.

As in Yugoslavia, it is clear that family members and authorized users of the product ordinarily have as much right to recover as does the purchaser. The *Restatement* does not mention bystanders, but most of the states, like the Yugoslavian courts, have held that they are also protected.²⁶ Our cases probably should be read as holding that anyone injured by a defective product may sue on a strict liability basis.

Our cases are also tending toward the rule that anyone involved in the manufacture or distribution of a defective product is strictly liable if it causes injury. Among those who have been recognized as appropriate defendants are the manufacturer, including a manufacturer of component parts and anyone purporting to be a manufacturer, the designer, assembler, importer, distributor, wholesaler, retailer, trade association, independent advertiser, independent testing laboratory, installer, second-hand dealer, bailor, lessor, licensor, hair-dresser, builder, finance company and repairman. A successor corporation may be liable for the torts of the company whose assets it has purchased,²⁷ and there are a few cases in which all manufacturers of a product have been held jointly liable when the guilty manufacturer could not be identified.²⁸

As I understand the Yugoslavian law, manufacturers may be held strictly liable, but except for possible contractual liability, retailers and other non-manufacturers face only a presumption of fault, which may be overcome by proof that they did not know or

25. *Cronin v. J.B.E. Olson Corp.* 8 Cal.2d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

26. *Elmore v. American Motors Corp.*, 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

27. *Ray v. Alad Corp.* 19 Cal.3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977); *Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974); *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976); *contra*, *Leannis v. Cincinnati-Forte Co.*, 565 F.2d 437 (7th Cir. 1977). See Elser, *Products Liability—Liability of Successor Corporations*, 12 *FORUM* 928 (1977); Comment, *Extension of Products Liability to Corporate Asset Transferees—an Assault on Another Citadel*, 10 *LOV. L.A.L. REV.* 584 (1977).

28. *Forel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir.), *cert. denied*, 419 U.S. 869 (1974) (manufacturers of asbestos); *Chance v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D. N.Y. 1972) (manufacturers of blasting caps).

could not have known of the defect. In most American states, manufacturers, retailers and all other defendants are subject to strict liability. Some of the states, however, have something like the Yugoslavian rule in what is called the "sealed container exception." In those states, if the defect cannot be discovered by ordinary inspection, persons other than the manufacturer usually cannot be held liable in strict tort or implied warranty,²⁹ although they may be liable for their negligence or an express warranty. Despite its name, the rule is applied in those states to products which do not come in sealed containers, such as automobiles. Also, a few states have recently passed statutes limiting strict liability to actions against manufacturers, and allowing suits against the seller only for his express warranty or negligence; I will return to this in Part III.³⁰

Our defenses are also similar to yours. In the last nine years, most of the states have discarded the old common-law rule that any contributory negligence on the part of the plaintiff bars all recovery in a negligence case. Although some have adopted the "pure" form of comparative negligence followed in Yugoslavia and most of the world,³¹ most provide that contributory negligence either *less than*³² or *not greater than*³³ the negligence of the defendant no longer bars but only reduces recovery.³⁴

Contributory negligence is always at least a partial defense in a negligence case. One of the *Restatement's* Comments states that

29. *McLeod v. W.S. Merrell Co.*, 174 So.2d 736 (Fla. 1965); *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964); *Pierce v. Liberty Furniture Co.*, 141 Ga. App. 175, 233 S.E.2d 33 (1977); *Ratliff v. Porter Cable Co.*, 210 F. Supp. 957 (E.D. La. 1962); *Wilkes v. Memphis Grocery Co.*, 23 Tenn. App. 550, 134 S.W.2d 929 (1939); 1978 Tenn. Pub. Acts, Chap. 703, eff. July 1, 1978.

30. See notes 68-69 and accompanying text *infra*.

31. By statute: Mississippi, New York, Rhode Island, Washington. By judicial decision: Alaska, California, Florida.

32. This is referred to as "50% bar," and is the law of Arkansas, Colorado, Georgia, Hawaii, Idaho, Kansas, Maine, Massachusetts, North Dakota, Oklahoma, Oregon, Utah and Wyoming.

33. This is called "51% bar," and is the law of Connecticut, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Pennsylvania, Texas, Vermont and Wisconsin.

34. A few states have special forms: plaintiff's "slight" negligence reduces rather than bars in Nebraska and South Dakota. Plaintiff's "remote" negligence is no bar in Tennessee, by judicial decision. There are special statutes providing for comparative negligence in particular kinds of cases, such as employer/employee suits or suits against common carriers, in several other states.

contributory negligence is not a defense in strict tort,³⁵ and this is the majority rule, but several states have disagreed. I predicted last year that the change to comparative negligence would make this conclusion easier to reach, and that more states would now reject the logical position of the *Restatement*.³⁶ Since then California and Minnesota have done so,³⁷ and I am sure that the partial defense of comparative negligence in strict tort will soon be the rule in the majority of states, as it is in Yugoslavia.

In implied warranty, many states have held that contributory negligence is at least a partial defense. Express warranty, on the other hand, invites the buyer's reliance and makes failure to discover a defect less likely to be considered blameworthy; accordingly, contributory negligence usually is no defense.

Like you, we generally recognize misuse of the product as a defense, but American cases add that a product should be safe for *foreseeable* misuse. Thus there is tort liability for automobiles which do not reasonably protect their occupants in a crash.³⁸ A similar rule has been applied to motorcycles,³⁹ small airplanes,⁴⁰ and most

35. Comment *n* to § 402A.

36. Schroth, note 10 *supra*, at 78.

37. *Daly v. General Motors Corp.*, 20 Cal.3d 927, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); *Busch v. General Motors Corp.*, 262 N.W.2d 377 (Minn. 1977). The defense has also been allowed recently in federal admiralty products liability cases, *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977); "pure" comparative negligence is now used in federal admiralty cases. Other states recognizing the defense include *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 47 (Alaska 1976); *West v. Caterpillar Tractor Corp.*, 336 So.2d 80 (Fla. 1976), 547 F.2d 885 (5th Cir. 1977); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *Edward v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (Mississippi law); *Stephen v. Sears, Roebuck & Co.*, 110 N. H. 248, 266 A.2d 855 (1970); *Mohr v. B. F. Goodrich Rubber Co.*, 147 N. J. Super. 279, 371 A.2d 288 (1977); N.Y. CPLR § 1411; *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Note that all of these are comparative negligence states. On the other hand, the defense has also been rejected recently in a few comparative negligence states. 1977 Conn. Pub. Acts, No. 77-335, eff. June 7, 1977; *Brown v. Link Belt Corp.*, 565 F.2d 1107 (9th Cir. 1977) (Oregon law); *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (Nebraska law).

38. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977).

39. *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973).

recently a telephone pole which (when struck by an automobile) collapsed and injured two children.⁴¹

Contingent fees are sometimes excessive if unregulated, particularly when the plaintiffs are ignorant or the recoveries especially high. The courts of New York and New Jersey have taken the lead in limiting contingent fees to the levels which many lawyers in other states charge without regulation.⁴² I am dismayed by the negative reaction of scholars in other countries to contracts *de quota litis*, since our experience has for the most part been good. Controlled contingent fees would benefit consumers and accident victims in many other countries which now forbid them entirely.

Once a lawyer has accepted the case, he begins an extensive process of preparation and discovery. Expert witnesses, who are usually selected and paid by the parties and their lawyers rather than by the court, are generally approached immediately, and often assist throughout the preparation of the case. In addition to providing advice on technical matters, they may conduct tests and carry out research which can be used as evidence at the trial.

American discovery procedures are vastly more thorough than those employed in other countries and routinely require disclosure to the adverse party of information foreign corporations might be unwilling to share with their own lawyers. Discovery is controlled by the lawyers, but the judge, who usually is not present, is often requested to rule on disputed points or to compel responses.

The exact forms of discovery vary from state to state, but four

40. *Wilson v. Piper Aircraft Corp.*, Nos. 72-4267 and 72-4281 (Lane Cty. Ct., Ore., July, 1976). See Donnelly, *Aircraft Crashworthiness: Plaintiff's Viewpoint*, 42 J. AIR L. & COM. 57 (1976); Reid, *Practical Aspects of General Aviation Litigation*, 40 J. AIR L. & COM. 661 (1974).

41. *Bernier v. Boston Edison Co.*, No. 339703 (Middlesex Cty. Super. Ct., Mass., Dec. 22, 1977); *Kasputys v. Boston Edison Co.*, No. 330325 (Middlesex Cty. Super. Ct., Mass., Dec. 22, 1977). These cases are discussed in 21 ATLA L. REP. 101-104 (1978).

42. N.J.S.A. CT. R. 1:21-7; N.Y.CT. R. 603.7(e), 691.20(e), 806.4, 1022.30. See *ATLA v. Supreme Court*, 126 N.J. Super. 577, 316 A.2d 19, *aff'd*, 66 N.J. 258, 330 A.2d 350 (1974); *Gair v. Peck*, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43 (1959), *cert. denied*, 361 U.S. 374 (1960). Both rules have schedules by which the percentage allowed as a fee decreases as the amount recovered increases. The New York rules, however, permit the lawyer to take a straight 33 1/3 percent instead. In New Jersey, and in New York when the straight 33 1/3 percent is not elected, the lawyer may appeal for a higher fee in extraordinary circumstances.

are common. The first is written interrogatories, which in federal courts are unlimited in number and length. State courts, on the other hand, often impose limits, and all courts have some power to limit unduly annoying or expensive interrogatories. The names of witnesses, the facts they know and the opinions they hold are all discoverable.

The second method is depositions of potential witnesses, including parties, employees and experts. These are usually oral question-and-answer sessions, with opportunities for cross-examination. The proceedings are taken down by a stenographer, and are usually tape-recorded and sometimes even videotaped in addition.

The third method is requests to produce documents and objects for inspection, photography and testing, and the fourth is requests for admission of facts and of the genuineness of documents. In the latter case, silence is treated as admission, and in case of unreasonable denial either party may be required to pay the other's costs of proving that point.

This is about as far as most cases go. Once the parties have a detailed understanding of each other's positions, they can usually agree on a settlement without trial, and most estimates are that about 97 or 98% of cases are settled.

If the case goes to trial, however, by far the most important factor is that almost uniquely American institution, the civil jury. Unlike even England, where the civil jury was all but abolished in 1966,⁴³ we normally rely on juries if torts cases go to trial. Over 85% of products trials are jury trials, and the proportion seems to be rising.

Nothing about our law of products liability can be properly understood unless the jury is considered. Our rules of evidence, which exclude much relevant but unfair or misleading evidence, are designed to protect the integrity of jury trials, but they are also used when the judge sits alone. Plaintiffs may rely on negligence when strict liability is legally available, and prove fault when they could simply claim *res ipsa loquitur* (a doctrine permitting proof of negligence by circumstantial evidence⁴⁴), because juries are thought to be more willing to require payment from those who are at fault. On the other hand, plaintiffs may be careful to limit their arguments to

43. *Ward v. James*, [1966] 1 Q.B. 273.

44. *See, e.g., Gilbert v. Corvette, Inc.*, 457 Pa. 602, 327 A.2d 94 (1974). *See generally* S. SPEISER, *THE NEGLIGENCE CASE: RES IPSA LOQUITUR* (1972, plus annual pocket supplements).

strict liability theories to keep the defense from introducing evidence of due care for exactly the same reason.

Since the jurors are likely to be looking for fault regardless of the judge's instructions, the defense seeks out opportunities to show that its behavior was careful and reasonable. If the plaintiff's theory is negligence, the defendant's evidence of due care is obviously relevant and admissible. Even in strict tort or warranty, however, the defendant often finds an opportunity. For example, the plaintiff must always prove that the defect existed at the time the product left the defendant's control, and this frequently gives the defendant a chance to introduce evidence of its careful manufacturing and inspection procedures to show that the defect could not have existed at that time.

II. The Underlying Differences

I will leave the more detailed exposition of these matters to Professor Wagner, and turn to some practical differences between the two systems. It seems to me that the differences in our methods of preparing cases and conducting trials are so great that the superficial similarity of your rules and ours may be seriously misleading.

Let me begin with a person who has been injured by a defective product, and follow him through the various steps toward recovery of damages. The victim must first seek out a lawyer who specializes in products cases, since the field has become so complex and difficult that unusual expertise is required. If the lawyer thinks the case is substantial enough to be worth his while, they will enter into a contingent-fee contract, under which the lawyer is paid a percentage of the award or settlement if he is successful, and nothing if he is not.

From the lawyer's point of view, what must be considered is that a simple products case may require twenty to fifty hours of preparation prior to trial, while a major case may require several hundred hours of preparation. With a typical contingent fee of one third, the lawyer who devotes a mere twenty hours to a simple case involving a foreign object in a bottled drink and wins a typical \$1500 for his client will gross only \$25 per hour. Since he must pay for his office, secretary, books, supplies and so forth, as well as supporting himself and paying taxes, he simply cannot afford to try the case for that amount. What he can afford to do is to refuse it, or to settle it quickly out of court for a much smaller sum. Neither the lawyer nor the contingent-fee system can be blamed for this failure of jus-

tice, however, since the number of hours of preparation which our system requires for effective presentation of a products case simply cannot be justified when the amount in controversy is so small.

In a serious case, however, such as one involving paralysis, extensive burns or blindness, the contingent-fee system shows its merit. If the plaintiff had to be prepared to pay his lawyer for the hundreds of hours of preparation sometimes required in such cases, only the wealthy could sue. In the United States, legal aid ordinarily is not available to plaintiffs in damage suits. Although we normally do not require the losing party to pay the winning party's attorney, that rule would only make things worse for the victim who is not absolutely certain of winning, and many meritorious claims might never be filed. With a contingent fee, lawyers are willing to take cases which seem likely to succeed at their own risk. The use of a contingent fee seems to have little effect on the amount of the verdict or settlement, but does permit less-wealthy persons to sue, since they pay the full cost of the attorney's services only if successful.

In the last few years, American trial lawyers have developed extremely sophisticated techniques for presenting complex evidence to the jury. There are artists who specialize in preparing maps, diagrams and charts for trial use, often with clear plastic overlays which allow particular aspects to be emphasized. Still photography, movies and more recently videotape are used extensively. Craftsmen are hired to construct detailed, working models of the product, or cutaway models showing its insides. Chemical demonstrations and actual experiments and tests with the product are often carried out right in the courtroom. Recently computer-generated models and simulations have begun to be offered in evidence, and it probably will not be long before they too become standard.

If the plaintiff wins, his recovery will be far more than it would be in Yugoslavia, and probably far more than in any other country in the world. This is of course largely because of the jury, but also because our judges feel more actively involved in lawmaking, and because our trial lawyers are highly skilled in dramatizing the evidence.

With nothing like paragraph 1324 of the Austrian Code⁴⁵ to hold them back, our courts have always felt equally free to award damages for lost profits and for pain and suffering whether liability

45. In Baeck's translation, note 2 *supra*, "In case of damage caused by malice or gross negligence, the person injured is entitled to demand full satisfaction, and in other cases only indemnity. Where the general expression 'damages' occurs in the law, it is to be interpreted pursuant hereto."

was based on malice, gross negligence, ordinary negligence or strict tort theories. Since damages for pain and suffering are not considered to be based on the defendant's fault, but rather to be compensatory, juries are allowed to assess them rather freely, although excessive verdicts may be reduced by the judge or the appellate court. If malice can be shown, punitive damage awards are allowed in addition, and they have even been permitted in a few strict liability cases.⁴⁶

To give you an idea of the amounts of money involved in these cases in the United States, here is a brief summary of all eight of the cases reported in the most recent issue of the monthly *ATLA Law Reporter*:⁴⁷

- An airconditioning workman was seriously burned when the compressor unit on which he was working exploded. Settled out of court for \$235,000.
- A 43-year-old man was killed at a picnic when an aluminum beer keg exploded. Settled out of court for \$350,000.
- The foot of a 10-year-old boy was mangled in a farm machine which had a protective grating with holes too large to protect him. Settled out of court for \$140,000.
- A large bakery was destroyed by fire when plastic foam labeled "self-extinguishing" was used near an oven and turned out to be highly flammable. Settled out of court for \$742,000.
- An 18-year-old worker lost his arm in a gravel crusher which had no protective screen. Settled out of court for \$262,000.
- A 20-year-old man was totally paralyzed and rendered unable to speak when he was hit by an object thrown by a power lawnmower. Settled out of court for \$775,000.
- A large truck carrying liquefied petroleum gas overturned and exploded, killing 17 persons, including the driver, and burning 25 more. Jury verdicts totalled over \$50,000,000, including \$1,000,000 punitive damages. The largest award was \$20,300,000 to a teen-aged bystander who suffered extensive burns.
- The 53-year-old driver of a concrete-mixing truck was

46. See generally Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

47. 21 ATLA L. REP. 230-32 (June 1978).

crushed to death when a tire blew out and the truck crashed into an embankment. Jury verdict for \$159,000.

III. Recent Developments

Until this year, it would have been safe to conclude a discussion of American products liability without mentioning any statutes except the Uniform Commercial Code. Even the Uniform Commercial Code was designed to encourage case-law development, and every important step in the evolution of products liability from the nineteenth century until 1977 was taken by the courts rather than by Congress or the state legislature.

This has suddenly changed. Before 1977, only two states had significant products liability statutes other than the Uniform Commercial Code,⁴⁸ and three more were passed during 1977.⁴⁹ But during the first six months of 1978, the legislatures of eleven states passed major laws dealing with products liability,⁵⁰ and bills are now pending in many more. The content of these new laws varies widely from state to state, but most of them deal with "statutes of repose" and the defenses of subsequent alteration and conformity to the "state of the art."

As a general rule, a tort action for personal injury or property damage must be brought within a set period from the date of the injury or from the date when it is discovered. In most states, this statute of limitations is either two or three years, and the range is

48. CONN. GEN. STAT. § 52-577a; FLA. STAT. § 95.031(2). See also KAN. STAT. § 60-513(b); MO. REV. STAT. §§ 516.097, 516.105; N. C. GEN. STAT. § 1-15.

49. COLO. REV. STAT. §§ 13-80-127.5, 13-21-401 *et seq.*; OR. REV. STAT. §§ 30.900 *et seq.*; UTAH CODE ANN. §§ 78-15-1 *et seq.*

50. 1978 Ariz. Sess. Laws, Chap. 19, eff. 90 days after adjournment of the 1978 session of the Legislature; 1978 Conn. Pub. Acts, No. 78-380, *vetoed by the Governor*, June 7, 1978; 1978 Ga. Laws, Act 1485, eff. July 1, 1978; 1978 Ind. Acts, H.B. 1396, eff. June 1, 1978; 1978 Ky. Acts, S. B. 119, eff. June 26, 1978; 1978 Minn. Laws, Chap. 738, eff. April 15, 1978; 1978 Neb. Laws, L.B. 665, eff. July 22, 1978; 1978 N.H. Laws, Chap. 31, eff. Aug. 22, 1978; 1978 R.I. Pub. Laws, Chap. 299, eff. July 1, 1978; 1978 S.D. Sess. Laws, H.B. 1116, eff. July 1, 1978; 1978 Tenn. Pub. Acts, Chap. 703, eff. July 1, 1978. In subsequent footnotes, these statutes are cited simply by the names of the states.

from one to six years.⁵¹ Since there is no limit running from the date of manufacture or sale, it is at least theoretically possible that a person might now be injured by a product defectively manufactured 100 years ago or more, and could sue the manufacturing company, or its successor,⁵² in strict tort.

Products-liability rules have been changing so rapidly in the 1960's and 1970's that much shorter periods seem like centuries to the insurers and self-insuring companies affected. Accordingly, several of the statutes that have been passed recently provide that products actions are completely barred ten years after the product is sold,⁵³ while others bar the actions six,⁵⁴ eight⁵⁵ or twelve⁵⁶ years after the sale. One state bars all actions twelve years from the date of manufacture instead of from the date of sale,⁵⁷ and another uses both types of limit, barring all actions ten years after manufacture or six years after sale.⁵⁸

Now six years is much more than the useful life of some products, and twelve years is much less than the useful life of others. Such arbitrary standards are certainly bad policy, and it has been argued that they may even violate the constitutional guarantees of due process and equal protection.⁵⁹ Minnesota's new law⁶⁰ responds to this in the manner of Llewellyn's part of the Uniform Commercial Code.⁶¹ It bars products liability actions after the product's ordinary useful life, and gives the court six factors to be considered, along with any others that seem relevant, in determining

51. It should be noted that the period may be different for personal injury than for property damage. When they are different, usually a longer period is provided for property damage than for personal injury, but in Montana and Utah a longer period is provided for personal injury. The two periods are the same in 33 states.

52. See note 27 and accompanying text *supra*.

53. Georgia, Indiana, Nebraska, Rhode Island, Tennessee. A few states have general statutes of repose, not limited to products liability, e.g., N.C. GEN. STAT. § 1-15(b) (ten years).

54. South Dakota.

55. Oregon; CONN. GEN. STAT. § 52-577a.

56. Arizona; FLA. STAT. § 95.031(2).

57. New Hampshire.

58. Utah.

59. E.g., Massery, *Date-of-Sale Statutes of Limitation: A New Immunity for Product Suppliers*, 1977 INS. L. J. 535.

60. See note 50 *supra*.

61. See note 8 and accompanying text *supra*.

whether the ordinary useful life had expired.⁶² Other states have recognized that products have varying useful lives in much less satisfactory ways, either by treating the arbitrary number of years as raising only a rebuttable presumption that there was no defect,⁶³ or by making useful life an additional requirement for the plaintiff. Under the latter rule, the action must be brought within ten years from the date of sale or within one year after the expiration of the anticipated life of the product, whichever is shorter.⁶⁴

With the exception of Minnesota's then, the new "statutes of repose" are blunt instruments brought to bear on a subtle problem which it would have been better to have left to the courts. The new provisions on subsequent alteration and "state of the art" similarly suggest ignorance or passion on the part of the legislators, resulting

62. 1978 Minn. Laws, Chap. 738, adds a new section, MINN. STAT. § 604.03:

Useful Life of Product

Subdivision 1. In any action for the recovery of damages for personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product, it is a defense to claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product.

Subd. 2. The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, manufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user.

63. This is the rule in Kentucky five years after sale or eight years after manufacture. In Colorado there is a rebuttable presumption ten years after sale that the manufacturer was not negligent and that all warnings and instructions were proper and adequate.

64. Tennessee.

from intensive lobbying by insurers and manufacturers.

The case law is quite clear that modifications of a product after it leaves the manufacturer's control may be raised if the result is that the defendant's action is no longer the proximate cause of the injury; in fact, the plaintiff is often required to prove that the product reached him without substantial change.⁶⁵ Nevertheless, the legislatures of nine states have recently confirmed by statute that alteration of the product after it leaves the defendant's control may be raised as a defense,⁶⁶ apparently under the illusion that they were making new law.

The "state-of-the-art" defense, on the other hand, may make a real difference in the law. The problem here is that the eight new state statutes making conformity to the "state of the art" at the time of manufacture a defense define the term "state of the art" in eight different ways. I will leave the details to a footnote,⁶⁷ but observe here that the term refers sometimes to governmental standards, sometimes to industry standards and sometimes to what is

65. *E.g.*, *Rossignol v. Danbury School of Aeronautics, Inc.*, 154 Conn. 549, 227 A.2d 418 (1967); *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Clarke v. Brockway Motor Trucks*, 372 F. Supp. 1342 (E.D. Pa. 1974).

66. Arizona, Georgia, Indiana, Kentucky, New Hampshire, Oregon, Rhode Island, Tennessee, Utah.

67. Arizona: if allegations of defective design or manufacturing, conformity to state of the art when sold by defendant is a complete defense. Colorado: in any products liability case, conformity to governmental and industry standards raises a rebuttable presumption that the product was not defective, while nonconformity raises a rebuttable presumption of defective or negligent manufacture. Indiana: if allegations of defective design, conformity to the generally recognized state of the art is a complete defense. Kentucky: if allegations of defective design, manufacturing or testing, conformity to the generally recognized and prevailing state of the art raises a rebuttable presumption that the product was not defective. Nebraska: if allegations of negligent or defective design, testing or labeling, conformity to the generally recognized and prevailing state of the art (defined as the best technology available at the time) is a complete defense. New Hampshire: complete defense that the risks were not discoverable using prevailing techniques under the state of the art and using procedures required by state and federal agencies. Tennessee: whether the product was defective and unreasonably dangerous when manufactured or sold is to be determined according to scientific and technological knowledge available at that time, rather than at the time of injury. Utah: if allegations of defective design, conformity to government standards raises a rebuttable presumption that the product was not defective.

"discoverable" and is all too often entirely undefined. Whatever it means, the manufacturer's conformity to it may be an absolute defense, or only raise a presumption either that the product was not defective or that it was not unreasonably dangerous. And the defense or presumption may apply only in cases based on design defects, in those plus others such as testing and labeling, or in all product cases.

No other significant statutory changes have been made by more than a few states. Four have now provided that strict liability actions may no longer be brought against a seller who is not the manufacturer, at least unless the manufacturer is beyond reach.⁶⁸ These statutes do not expressly provide that there is a presumption that the seller is negligent, which seems to be the case in Yugoslavia, but sometimes this is the result if the doctrine of *res ipsa loquitur* applies.⁶⁹ The purpose, however, is plainly to make the manufacturer primarily liable, with the non-negligent seller available as an alternative source of compensation only if the manufacturer is unidentifiable, insolvent or not subject to the jurisdiction of the state courts.

Two states have recently adopted statutes confirming the existing rule that misuse of the product is a defense,⁷⁰ and two others have confirmed the universal rule of evidence⁷¹ that subsequent measures taken by the defendant are not admissible to show fault, although they remain admissible for other purposes.⁷² Finally, some state legislatures have recognized their lack of information on which products-liability statutes should be based, and have, like the federal government,⁷³ ordered that further studies be made.⁷⁴

68. Colorado, Kentucky, Nebraska, Tennessee.

69. See note 44 and accompanying text *supra*.

70. Arizona, Indiana.

71. *E.g.*, UNIFORM RULE OF EVIDENCE 51; FED. R. EVID. 407.

72. Nebraska; 1978 Va. Acts, Chap. 165, eff. July 1, 1978.

73. The FINAL REPORT of the Interagency Task Force on Products Liability, issued in November 1977, was preceded by a LEGAL STUDY, an INSURANCE STUDY and an INDUSTRY STUDY. The Task Force includes the Departments of Commerce, Health, Education and Welfare, Housing and Urban Development, Justice, Labor, Transportation and Treasury, the Council of Economic Advisors, the Office of Management and Budget and the Small Business Administration. Perhaps the most important effect of the studies has been to shatter some of the myths contributing to the "crisis" in products liability. For example, I estimated last year that there were "50,000 or more" products-liability cases being filed each year, "and the number is no longer rising rapidly," in sharp contrast to insurance industry assertions of 1,000,000 or so. Schroth, note 10 *supra*, at 67. The FINAL REPORT says about 60,000 to 70,000 products-liability claims were filed in 1976.

74. *E.g.*, 1978 Minn. Laws, Chap. 644.

The federal Congress presumably will digest the information it has recently received from a series of major studies by an Interagency Task Force on Products Liability⁷⁵ and produce some sort of legislation, but as of July 31, 1978, none of the dozens of bills that have been introduced had even been scheduled for a hearing. Most of these bills deal with tax deductions for products-liability reserves or trusts, but a few would affect the substantive law. Bills introduced by Congressman LaFalce, for example, would establish federal rules of products liability to which the states would be required to conform.⁷⁶ It appears—and I might add that I hope—that these misguided proposals have no chance whatever of becoming law.

A much more important reform would be some mechanism for making products-liability insurance available at reasonable rates to small manufacturers. While large companies usually have no difficulty in paying for insurance and in satisfying judgments, some small companies have had great difficulty, and some have even been driven out of business. In 1976, for example, only 3% of manufacturing firms with over \$100 million gross sales did without products-liability insurance, while 29% of those with gross sales of less than \$2,500,000 were uninsured. This is the one part of the so-called "crisis" in products liability that seems to be real, but neither Congress nor the states have taken any significant action as yet.⁷⁷

In short, the statutes which have been passed mostly fail to speak to any real problems, and do speak loudly, though sometimes incoherently, to problems that do not exist. There is no objective crisis in American products liability, but some of the insurance companies and manufacturers have succeeded in creating the illusion of one. It is possible, even easy, to create the illusion because lawyers, legislators and the public are ignorant about products liability, which in the United States is an exceedingly complicated subject.

But it has been especially easy for the insurance companies to create the illusion of a crisis because the insurance companies have until very recently had complete control of all the data. Products-liability statistics are not even offered to the public in insurers' Annual Statements, but rather buried under the general heading "liability other than automobile or medical malpractice." I think

75. See note 73 *supra*.

76. H.R. 11788 and 12470, 95th Cong., 2d Sess. (1978).

77. Some bills have been introduced in Congress, *e.g.*, S. 403 and H.R. 9155, 95th Cong., 2d Sess. (1977), but no action has been taken so far.

it was Mark Twain who said that a lie can go halfway around the world while the truth is putting on his shoes, and we have just shown that it can stampede more than a dozen state legislatures along the way.

Conclusion

If I seem to have belittled the extraordinary convergence between American and Yugoslavian products liability, let me re-emphasize it now. Given the general nature of the two systems of law, which will not be changed just for products liability, it is difficult to see how these rules could become much more similar than they are, even if we set out consciously to imitate one another. Since I know that we have not been imitating you—indeed, probably only a handful of Americans are even aware that there is strict liability in Yugoslavia—and since I doubt that you are imitating us, how do we account for the similarity in a world in which most of the industrialized countries still require fault?

In the United States, the general tendency of the courts is toward very strict liability, and except for the new “statutes of repose,” the legislatures have done very little to interfere. At the same time, there is a strong movement for direct compensation plans, which would pay for injuries without judicial proceedings. No-fault insurance plans of various kinds have now been adopted by many of the states for automobile accidents, and it is proposed that this principle be extended to other sorts of accidents, including those caused by defective products.⁷⁸

Thus we are tending to eliminate the need to prove fault in products cases for two different, but related, groups of reasons. We are turning to strict liability in tort because it more effectively places the costs on those who can control them, who are primarily the manufacturers and secondarily the distributors and retailers. They can reduce the costs of accidents by producing safe products, by supplying better warranties, by inspecting and testing more thoroughly and by purchasing insurance at the lower rates available for large groups.⁷⁹ The courts feel justified in allowing these eco-

78. See J. O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975).

79. See generally G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

conomic principles to play a major role, to the disadvantage of defendants, in part because the difficulty of proving fault in matters as complex as defective products places plaintiffs at a very serious disadvantage under the traditional negligence law.⁸⁰

We are urged to go beyond strict liability in tort to no-fault insurance liability for the same reasons, plus the additional point that the tort system as it is used for products liability in the United States is extremely expensive. It appears, for example, that of every \$100 now spent on products-liability insurance, only about \$45 finds its way to accident victims.⁸¹ The rest goes to the lawyers for plaintiff and defendant, to the expert witnesses and others who assist in preparation and trial, and to the insurance companies. An insurance system which paid claims simply on proof of loss and causation, rather than on proof of fault or defect, would have lower operating costs and could pay much more to victims without an increase in premiums. It is argued that this would more than compensate for the loss in fairness and in incentives for manufacturers to use due care.

I can only speculate on the reasons why Yugoslavia is adopting much the same reforms that we are, but it is clear that the reasons cannot be entirely the same. Certainly products are as complex in Yugoslavia as in America, so the burden of proving fault or defect must be similarly severe, and perhaps unfair to the accident victim. But trials are not so costly and complex in Yugoslavia, and I am sure that a higher percentage of the total amount invested in your insurance and liability systems must be used to compensate accident victims than is the case in our country.

One of the most basic principles of the Yugoslavian system is self-management by the working people. The conflict we have in America between manufacturers and consumers should thus in theory be eliminated, since the working people are both the consumers and the manufacturers. Thus whatever conflict exists in determining social policy must be between the interest group of consumers and the interest group of workers, and these are nearly identical. If this is true, then there is much less need to locate blame in your system, and socialist morality can focus on the economically

80. See generally *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion of Traynor, J.); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (opinion of the court by Traynor, J.).

81. For the calculations, see Schroth, note 10 *supra*, at 80.

correct allocation of the social costs of production, which include injuries to consumers.

What I am suggesting is that for our quite different reasons we may both be stripping away the old systems that required a search for fault, revealing the underlying economic principles common to all modern societies. Perhaps if we can emphasize our shared problems in these and future discussions, we legal scholars can play a role in reducing the conflicts, and in encouraging the peoples of the world to think of themselves as the inhabitants of a planet too small for enemies and wars.